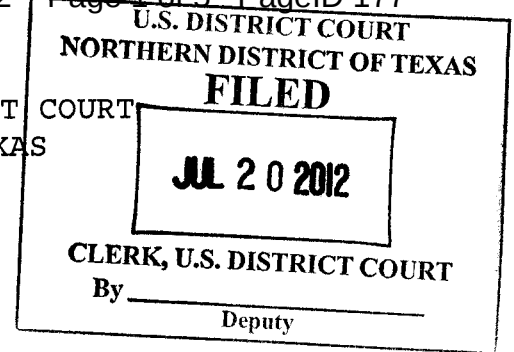


IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION



JERALD JEROME DORSEY,

Plaintiff,

VS.

FNU RELF, ET AL.,

Defendants.

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NO. 4:12-CV-021-A

MEMORANDUM OPINION

and
ORDER

Came on for consideration the motion to dismiss action based on absolute immunity, filed in the above action by defendant Linda Hemingway ("Hemingway"). Plaintiff, Jerald Jerome Dorsey, filed nothing in response to the motion. Having considered Hemingway's motion and appendix, as well as the applicable legal authorities, the court concludes that the motion should be granted.

I.

Plaintiff's Claims Against Hemingway

Plaintiff filed his original complaint on January 10, 2012, alleging claims against Hemingway, a physical therapist at Federal Correctional Institution in Fort Worth, Texas ("FCI--Fort Worth"), as well as against two FCI--Fort Worth correctional

officers and United States of America. The complaint makes the following allegations pertinent to Hemingway:

Plaintiff, who is incarcerated at FCI--Fort Worth, is a wheelchair-bound paraplegic. Plaintiff uses a wheelchair specifically designed for paraplegic individuals in that it allows the user to apply pressure on the footrest bar. Prisoners at FCI--Fort Worth repair wheelchairs under the supervision of Hemingway, who is also responsible for ordering the necessary parts. When plaintiff took his wheelchair to the repair shop at FCI--Fort Worth he was told no parts were available for the repairs because Hemingway had refused to order them.

On May 13, 2010, a prisoner in the repair shop who inspected plaintiff's wheelchair determined that the chair needed front wheel bearings, which the repair shop did not have. The prisoner in the repair shop believed that without the repairs plaintiff's wheelchair was dangerous and unsafe to use. Because FCI--Fort Worth did not have another paraplegic wheelchair available Hemingway assigned plaintiff a wheelchair typically used for transfers. Hemingway did not warn plaintiff that the substitute wheelchair could flip or tilt if pressure was exerted on the footrests, nor was training provided to plaintiff on how to use the wheelchair. Later that day, when plaintiff applied pressure

to the footrests of the substitute wheelchair, the chair titled forward and "catapulted" plaintiff to the floor, causing him to break his leg. Compl. at 11.

Plaintiff also alleged that Hemingway refused to allow him to obtain a pair of wheelchair gloves, and refused to allow him to conduct physical therapy exercises.

Plaintiff asserted claims against United States of America under the Federal Tort Claims Act, and asserted Bivens¹ claims for violation of his constitutional rights against Hemingway and the correctional officers.

II.

Grounds of Hemingway's Motion and Analysis

Hemingway contends that as an officer of the United States Public Health Service ("PHS") she is entitled to absolute immunity from suit under the provisions of 42 U.S.C. § 233(a), which provides:

(a) Exclusiveness of remedy
The remedy against the United States provided by sections 1346(b) and 2672 of Title 28, or by alternative benefits provided by the United States where the availability of such benefits precludes a remedy under section 1346(b) of Title 28, for damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigation, by any commissioned officer

¹Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971).

or employee of the Public Health Service while acting within the scope of his office or employment, shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee (or his estate) whose act or omission gave rise to the claim.

42 U.S.C. § 233(a).

In case the statutory language left any doubt about its intentions, the United States Supreme Court recently affirmed that § 233(a) precludes Bivens claims against officers or employees of the PHS. In Hui v. Castaneda, ___ U.S. ___, 130 S. Ct. 1845 (2010), the Court reversed the lower courts' denial of PHS employees' motions to dismiss Bivens claims against them based on the absolute immunity provided by § 233(a). The Court held that based on the "plain language" of § 233(a), "PHS officers and employees are not personally subject to Bivens actions for harms arising out of" their conduct when acting within the scope of their office or employment. Id. at 1848.

The uncontroverted evidence submitted by Hemingway in conjunction with her motion shows that she is a commissioned officer of the PHS. The evidence also shows that Hemingway's actions as alleged in the complaint were done in the course and scope of her duties as an officer of the PHS. Under the plain language of § 233(a), and consistent with the Supreme Court's

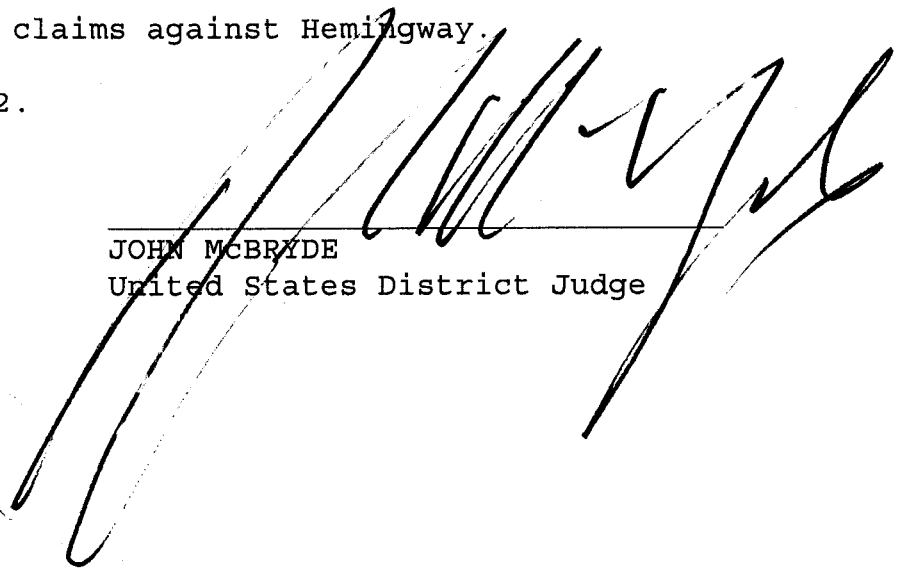
decision in Hui, Hemingway is entitled to absolute immunity as to plaintiff's Bivens claim against her.

Therefore,

The court ORDERS that Hemingway's motion to dismiss be, and is hereby, granted, and that all claims and causes of action brought by plaintiff, Jerald Jerome Dorsey, against defendant Hemingway in the above-captioned action be, and are hereby, dismissed with prejudice.

The court determines that there is no just reason for delay in, and hereby directs, entry of final judgment as to the dismissal of plaintiff's claims against Hemingway.

SIGNED July 20, 2012.



JOHN MCBRYDE
United States District Judge